

Message Text

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ACTION EUR-12

INFO OCT-01 ISO-00 CIAE-00 COME-00 EB-08 INR-07 LAB-04
NSAE-00 SIL-01 DODE-00 PM-04 H-01 L-03 NSC-05 PA-01
PRS-01 SP-02 SS-15 USIA-06 TRSE-00 OC-06 CCO-00
USPS-01 /078 W
-----241637Z 023835 /40

R 241549Z JAN 77
FM AMEMBASSY LONDON
TO SECSTATE WASHDC 9792
INFO AMCONSUL BELFAST
AMCONSUL EDINBURGH

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E.O. 11652: N/A
TAGS: PINT, PGOV, ELAB, UK
SUBJECT: BOYCOTT INJUNCTION RAISES IMPORTANT
CONSTITUTIONAL ISSUE

REF: LONDON 0831

SUMMARY. THE RECENT APPEAL COURT INJUNCTION BLOCKING A
PLANNED POST OFFICE WORKERS BOYCOTT OF SOUTH AFRICA
(REFTEL) AGAIN FOCUSED ATTENTION ON THE NAGGING POLITICAL
QUESTION OF TRADE UNION POWER. BUT IT ALSO RAISED A
MUCH LARGER AND MORE FUNDAMENTAL CONSTITUTIONAL ISSUE:
WHETHER BRITISH COURTS CAN OVERRULE AN ATTORNEY GENERAL'S
DECISION NOT TO PROSECUTE IN PUBLIC (AS OPPOSED TO
PRIVATE) INTEREST CASES. THE LEGAL PRECEDENTS ARE
PRECISE AND CLEAR: THE ATTORNEY GENERAL'S DECISIONS ARE
FINAL, UNLESS CHALLENGED BY PARLIAMENT, AND BEYOND THE
JURISDICTION OF THE COURTS, AND SO ARGUED ATTORNEY
GENERAL SILKIN. THE APPEAL COURT, WHICH IN RECENT YEARS
HAS SUCCESSFULLY EXTENDED ITS POWERS TO REVIEW EXECUTIVE
DECISIONS, IS STILL CONSIDERING THE CASE, BUT MANY OB-
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SERVICES BELIEVE IT WILL AGAIN SEEK TO EXTEND ITS
AUTHORITY. SHOULD THIS HAPPEN, THERE IS NO DOUBT THAT
SILKIN WILL APPEAL TO THE HOUSE OF LORDS. IF THAT APPEAL
FAILS, THE ISSUE WILL PROBABLY BE JOINED IN COMMONS, AS
IT STRIKES AT THE CENTRAL PRECEPT OF THE BRITISH
CONSTITUTION, THE SOVEREIGNTY OF PARLIAMENT. THIS RELA-
TIVELY MINOR DISPUTE, ACCORDINGLY, MAY BE SETTING THE

STAGE FOR AN IMPORTANT CONSTITUTIONAL SHOWDOWN THAT WILL BE PLAYED OUT IN AN INCREASINGLY STRESSFUL POLITICAL ATMOSPHERE. END SUMMARY.

1. THE JANUARY 15 DECISION OF THE APPEAL COURT TO ACCEPT A PRIVATE PETITION TO ENJOIN THE POST OFFICE WORKERS UNIONS FROM BOYCOTTING SOUTH AFRICAN MAIL AND COMMUNICATIONS, AND TO ASK ATTORNEY GENERAL SAM SILKIN TO EXPLAIN HIS REASONS FOR REFUSING TO SANCTION THE PETITION, HAS POSED AN IMPORTANT LEGAL ISSUE WITH CENTRAL CONSTITUTIONAL IMPLICATIONS. THE ISSUE IS WHETHER COURTS CAN ALLOW PRIVATE CITIZENS TO SEEK ENFORCEMENT OF THE LAW RELATING TO PUBLIC POLICY WITHOUT THE AGREEMENT OF THE ATTORNEY GENERAL. THE GUARDIAN CALLED IT "ONE OF THE MOST IMPORTANT CONSTITUTIONAL ISSUES TO COME BEFORE THE COURTS IN MANY YEARS."

2. AT ITS SIMPLEST LEVEL, THE QUESTION RAISED BY THIS CASE IS FAMILIAR AND VEXING. IT IS THE USE OF TRADE UNION POWER AND HOW AND UNDER WHAT CIRCUMSTANCES IT SHALL BE LIMITED. IN 1973 THE POST OFFICE WORKERS IMPOSED A BOYCOTT ON COMMUNICATIONS WITH FRANCE. EVEN THOUGH OBSTRUCTION OF THE MAILS, THEN AS NOW, IS A CRIMINAL OFFENSE, THE CONSERVATIVE ATTORNEY GENERAL DECLINED TO PROSECUTE THE UNION. BUT THE ANALOGY IS INCOMPLETE, FOR THIS TIME A PRIVATE INDIVIDUAL, WITH THE POLITICAL AND FINANCIAL BACKING OF A RIGHT-WING, ANTI-UNION GROUP -- THE NATIONAL ASSOCIATION FOR FREEDOM (NAF) -- SOUGHT TO ENJOIN THE PROPOSED BOYCOTT. SILKIN LIMITED OFFICIAL USE

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DECLINED TO SANCTION THE APPLICATION FOR INJUNCTION (IN PART TO PREVENT FRIVOLOUS LITIGATIONS, PRIVATE PARTIES CANNOT BRING ACTIONS IN THE PUBLIC INTEREST WITHOUT THE SUPPORT OF THE ATTORNEY GENERAL). THE PETITIONER SOUGHT RELIEF IN THE HIGH COURT, WHERE JUSTICE STOCKER SUSTAINED SILKIN'S DECISION. THE PETITIONER THEN SOUGHT AND OBTAINED AN EXTRAORDINARY SATURDAY SITTING OF THE APPEAL COURT TO HEAR HIS CASE. THE THREE APPEAL JUDGES -- LORD DENNING, LORD JUSTICE LAWTON AND LORD JUSTICE ORMAND -- FOUND FOR THE PETITIONER, ISSUED THE INJUNCTION AND CALLED ON SILKIN TO EXPLAIN THE REASONS FOR HIS FAILURE TO SUPPORT THE PETITIONER ON SUCH A CLEAR VIOLATION OF THE LAW. THE PROPOSED ACTIONS OF THE UNIONS, THE INVOLVEMENT OF THE NAF AND THE ACTIONS OF THE TWO COURTS INSURED THAT THE CASE QUICKLY BECAME A MAJOR, AND CONTENTIOUS, POLITICAL CAUSE.

3. WHEN SILKIN APPEARED BEFORE THE APPEAL COURT ON JANUARY 18, HE ARGUED THAT: (A) HE HAD ABSOLUTE DIS-

CRETION, SUBJECT ONLY TO REVIEW BY PARLIAMENT, IN DETER-
MINING THE PUBLIC INTEREST; (B) HE DID NOT HAVE TO

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EXPLAIN OR JUSTIFY HIS DECISION TO THE COURTS; AND (C)
THE COURT, IN CHALLENGING HIS DECISION, WAS ATTACKING THE
PRINCIPLE OF PARLIAMENTARY SOVEREIGNTY. (THE BRITISH
CONSTITUTION, LAW AND PRACTICE, OF COURSE, ARE DISTINCT
FROM THOSE OF THE U.S.) MOST BRITISH LEGAL OBSERVERS
CONSIDER SILKIN'S POSITION IRREPROACHABLE. IN THE
LAST SIMILAR CASE, IN 1902, LORD HALSBURY RULED: "THE
INITIATION OF LITIGATION AND THE DETERMINATION OF THE
QUESTION OF WHETHER IT IS A PROPER CASE FOR THE ATTORNEY
GENERAL TO PROCEED IN IS A MATTER ENTIRELY BEYOND THE
JURISDICTION OF THIS OR ANY OTHER COURT. IT IS A QUES-
TION WHICH THE LAW OF THIS COUNTRY HAS MADE TO RESIDE
EXCLUSIVELY IN THE ATTORNEY GENERAL." THE SUNDAY TIMES
JANUARY 23 QUOTED PROFESSOR JOHN EDWARDS, A LEADING
EXPERT ON BRITISH LAW, ON THE CURRENT CASE AS FOLLOWS:
"THERE IS NO DOUBT IN MY MIND THAT, SO FAR AS THE LAW IS
CONCERNED, THE ATTORNEY GENERAL'S POSITION IS IRREFUT-
ABLE, UNLESS THE APPEAL COURT WANT TO MAKE NEW LAW." THE
QUESTION BEFORE THE APPEAL COURT, AS THE SUNDAY TIMES
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OBSERVED, IS NOT SO MUCH "WHO GOVERNS BRITAIN" AS WHO SHALL REFORM IT. AND MANY OBSERVERS BELIEVE THE APPEAL COURT WILL SEEK TO MAKE NEW LAW.

4. LORD DENNING AND LORD JUSTICE LAWTON, IN PARTICULAR, HAVE IN THE PAST SOUGHT TO EXTEND THE PURVIEW OF THE COURTS. THE FORMER IS A WELL KNOWN CHAMPION OF INDIVIDUAL RIGHTS, WHETHER AGAINST THE GOVERNMENT, THE BUREAUCRACY OR THE UNIONS. INDEED, BOTH RULED AGAINST THE ATTORNEY GENERAL IN A SIMILAR 1972 CASE, ONLY TO HAVE THEIR DECISION OVERTURNED ON APPEAL. THEY HAVE NOT BEEN ALONE IN THEIR JUDICIAL ACTIVISM. IT HAS BEEN VERY MUCH ON THE UPSWING IN RECENT YEARS, AND THE SUBJECT OF CONSIDERABLE DISCUSSION AND DEBATE IN BRITISH LEGAL CIRCLES -- SEE THE EMBASSY'S 1976 SPECIAL REPORT "FREEDOM OF INFORMATION AND OPEN GOVERNMENT". MOST RECENTLY THE COURTS HAVE SUCCESSFULLY CHALLENGED EXECUTIVE AUTHORITY IN THREE CASES -- THE TAMESIDE COMPREHENSIVE EDUCATION DISPUTE, THE LAKER SKYTRAIN CASE, AND A TV LICENSING CONFLICT. IN THESE CASES, HOWEVER, THEY FOUND THAT THE GOVERNMENT MINISTERS INVOLVED HAD EXCEEDED THE POWERS VESTED IN THEM BY PARLIAMENT (I.E. STATUTE). AND THAT, AS SILKIN REMINDED THE APPEAL COURT, IS A FAR DIFFERENT ISSUE FROM THAT OF THE ATTORNEY GENERAL'S CONSTITUTIONAL AUTHORITY, ESPECIALLY SINCE HE, UNLIKE ALL OTHER MINISTERS, IS NOT BOUND BY "COLLECTIVE RESPONSIBILITY."

5. IF THE APPEAL COURT RULES AGAINST SILKIN, HE IS CERTAIN TO APPEAL THE DECISION TO THE HOUSE OF LORDS. TRADITION MIGHT SUGGEST THAT THE LORDS WOULD BE INCLINED TO SUPPORT SILKIN, BUT THERE IS NO ASSURANCE THIS WOULD BE THE CASE. THE HEREDITARY AND CONSERVATIVE LIFEPEERS IN RECENT TIMES HAVE BEEN IMPORTANT PROPONENTS OF PROPOSED CONSTITUTIONAL REFORM -- E.G. PROPORTIONAL REPRESENTATION, A BILL OF RIGHTS, FEDERALISM -- DESIGNED TO STRENGTHEN THE RIGHTS OF INDIVIDUALS. THIS TENDENCY

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HAS BEEN ESPECIALLY NOTICEABLE SINCE LABOR RETURNED TO POWER IN 1974. AT THE SAME TIME. THE LORDS HAVE STRONGLY RESISTED REFORMS WHICH MIGHT INCREASE TRADE UNION POWER. ALTHOUGH THE CASE AT HAND WOULD ONLY BE HEARD BY THE LAW LORDS, IT SEEMS HIGHLY UNLIKELY THAT THEY HAVE BEEN UNINFLUENCED BY GENERAL SENTIMENT IN THE UPPER HOUSE OR BY THE TENDENCY IN THE JUDICIARY TO EXTEND ITS

LIMITS OF REVIEW.

6. ALTHOUGH FEW OBSERVERS HAVE COMMENTED PUBLICLY ON CONTINGENCIES BEYOND THE HOUSE OF LORDS, A DECISION BY THAT BODY DOES NOT NECESSARILY DECIDE THE ISSUE. IF SILKIN SHOULD LOSE IN THAT FORUM, THE GOVERNMENT COULD (AND IN THE VIEW OF GOVERNMENT OFFICIALS WITH WHOM WE HAVE SPOKEN, ALMOST CERTAINLY WOULD) RAISE THE ISSUE IN COMMONS. A SIMPLE STATUTE, WE UNDERSTAND, WOULD RESTORE THE STATUS QUO ANTE. COMMONS, IT SEEMS TO US, WOULD PROBABLY GIVE SILKIN A VERY SYMPATHETIC HEARING, FOR IT, NOT THE UPPER HOUSE, IS THE MUSCLE AND SINEW OF PARLIAMENTARY SOVEREIGNTY. WE WOULD GUESS THAT CONSERVATIVE LEADERS WOULD FIND IT VERY DIFFICULT TO OPPOSE LEGISLATION CONFIRMING THE SOVEREIGNTY OF PARLIAMENT AND EXEMPTING THE ATTORNEY GENERAL FROM JUDICIAL REVIEW, DESPITE THEIR SYMPATHY FOR "INDIVIDUAL FREEDOM" ARGUMENTS, AS WOULD MOST LAWYER MPS. NEVERTHELESS, INTRODUCTION OF THE ISSUE INTO AN ALREADY DIVIDED AND CONTENTIOUS PARLIAMENT IS LIKELY TO INTENSIFY POLITICAL STRESS IN THE UK RATHER THAN DIMINISH IT, AND THAT WOULD BE UNFORTUNATE.

ARMSTRONG

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01-Jan-1994 12:00:00 am
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Current Classification: UNCLASSIFIED
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Copy: SINGLE
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Decaption Date: 01-Jan-1960 12:00:00 am
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Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 22 May 2009
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1977LONDON01244
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Expiration:
Film Number: D770025-0327
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From: LONDON
Handling Restrictions: n/a
Image Path:
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Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
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Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 77 LONDON 831
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Review Action: RELEASED, APPROVED
Review Content Flags:
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Review Event:
Review Exemptions: n/a
Review Media Identifier:
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
SAS ID: 3523132
Secure: OPEN
Status: NATIVE
Subject: BOYCOTT INJUNCTION RAISES IMPORTANT CONSTITUTIONAL ISSUE
TAGS: PINT, PGOV, ELAB, UK
To: STATE
Type: TE
vdkgvwkey: odbc://SAS/SAS.dbo.SAS_Docs/93212bd2-c288-dd11-92da-001cc4696bcc
Review Markings:
Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
22 May 2009
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009